IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT, STATE OF FLORIDA

AMERILOSS PUBLIC ADJUSTING, CORP.,

Appellant,

v.

DCA Case No. 3D09-363
DFS Case No. 97407-09-DS

In Re: DECLARATORY STATEMENT RENDERED IN THE MATTER OF CLYDE LIGHTBORN.

ANSWER BRIEF OF THE

THE FLORIDA DEPARTMENT OF FINANCIAL SERVICES

David J. Busch
Florida Department of
Financial Services
Division of Legal Services
200E. Gaines Street
Tallahassee, FL 32399

COUNSEL FOR THE DEPARTMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF THE CASE AND FACTS

The "Background & Facts Asserted in Petition" portion of the Department of Financial Services' (Department's) Declaratory Statement and those stated in the petition itself (R-3-4, 15) are adequate to decide the issues presented on this appeal.

SUMMARY OF THE ARGUMENT

At the time Department lawyer Terry Butler stated that there was no legal limit on fees which could be charged by a public adjuster when no emergency rule was in effect, there was no such limit (February 10, 2006). However, the Department concluded that Florida property owners, having suffered from catastrophic windstorms, should not be victimized a second time by rapacious public adjusters following the State of Emergency. The Department thus proposed remedial language to *Florida Administrative Code* Rule 69B-220.201 ("Ethical Considerations"). If Ameriloss failed to participate during the lengthy rule adoption process, it wasn't due to a lack of notice which the Department published a week after Mr. Butler's letter. *See* vol. 32, no. 7 *Fla. Admin. Weekly* (2/17/06) at p. 698.

Ameriloss would have this Court believe that the Department acted without authority, thereby denying Ameriloss due process. However, the Florida Legislature made sure the regulatory agency charged with overseeing insurance adjusters' conduct had sufficient rule authority to address their dealings with those

suffering from insured losses. Section 626.878, *Florida Statutes* (2008) provides:

> **Ru1es; code of ethics.** - An adjuster shall subscribe to the code of ethics specified in the rules of the department [of Financial Services]. **The rules shall** implement the provisions of this part and **specify the terms and conditions of contracts,** including a right to cancel, **and require practices necessary to ensure fair dealing,** prohibit conflicts of interest, and ensure preservation of the rights of the claimant to participate in the adjustment of claims. (Emphasis added.)

Although the statute cited above is not mentioned in Ameriloss' brief, it is the primary authority for the rule and the concomitant declaratory statement of which Ameriloss complains.

Although not a party to the proceeding, the six-page Declaratory Statement resulting from the petition, specifically addressed Ameriloss' complaint that it had somehow suffered from retroactive application of rule language adopted months before its contract with Mr. Lightbourn:

> [I]t is clear that AmeriLoss had *prior notice* that only a ten percent fee for such services rendered in connection with hurricane damage was deemed to be appropriate, because the rule at issue was already in effect at the time the parties entered into the fee agreement. When weighing the criteria enumerated by the controlling case law, the most supportable view is that the application of the rule in this specific instance would not constitute an impermissible retroactive operation. (R-6; emphasis in original.)

contrary t.o Ameriloss' conclusion (IB-28), Florida

Administrative Code Rule 69B-220.201 **does** apply to the Lightbourn contract and therefore the Declaratory Statement should be affirmed.

DEPARTMENT'S ANSWER TO POINT ONE

I. STANDARD OF REVIEW

As to each of the five issues Ameriloss has raised on this appeal, it urges this Court to engage in de *novo* review because it deems each issue "purely one of law." (IB-14, 16, 20, 22, 25) Wrong. As was stated in *Adventist Health System v. Agency For Health Care Administration,* 955 So.2d 1173 (Fla. 1st DCA 2007) at 1176:

> Generally, an appellate court may reverse an agency's declaratory statement only if the agency's interpretation of a statute is clearly erroneous. *See Regal Kitchens, Inc. v. Fla. Dep't Revenue,* 641 So.2d 158, 162 (Fla. 1st DCA 1994). In this case, however, the agency concluded as a matter of law that Appellant did not have standing to seek a declaratory judgment. "Whether a party has standing to bring an action is a question of law that is to be reviewed de novo." *See Mid-Chattahoochee River Users v. Fla. Dep't of Envtl. Prot.,* 948 So.2d 794, 796 (Fla. 1st DCA 2006).

If this Court was obliged to review de *novo* every declaratory statement issued by every Florida agency, there would be little need in having Section 120.565, *Florida Statutes* (2008) Certainly agencies opine on statutes and rules within their respective jurisdictions, but that does not mean that the

resultant declaratory statements are purely matters of law. Each "particular set of circumstances" (§ 120.565(1), *Fla. Stat.)* requires an application of an agency's special expertise long given deference by Florida's appellate courts. See, e.g., *Sans Souci, infra* at 421 So. 2d 626.

II. THE FLORIDA DEPARTMENT OF FINANCIAL SERVICES DID NOT EXCEED ITS STATUTORY AUTHORITY BY ISSUING THE DECLARATORY STATEMENT AT ISSUE.

Section 624.307(1), *Florida Statutes* (2008), authorizes the Department to enforce provisions of the Florida Insurance Code. The Florida Insurance Code, as specified in Section 624.01, *Florida Statutes* (2008), includes Chapter 626, PART VI which applies to insurance adjusters (§§ 626.851 - .8797, *Fla. Stat.),* including Section 626.878, *Florida Statutes* (2008) quoted above. The Department is required to "enforce the provisions of the code and … execute the duties imposed upon them by this code." § *624.301(1), Fla. Stat. (2008).*

Section 120.565, *Florida Statutes* (2008) governs declaratory statements by agencies, enabling the Department to issue a declaratory statement in response to a petition outlining with particularity the petitioner's set of circumstances. § 120.565(1), *Fla. Stat.* (2008). Therefore, the Department has authority not only to interpret the applicable provisions of Chapter 626, but to issue a declaratory statement when a substantially affected party petitions for such "stating

with particularity the Petitioner's set of circumstances." § 120.565(2), *Fla. Stat.* (2008). *See Lennar Homes, Inc. v. Department of Business and Professional Regulation*, 888 So.2d 50, 51 (Fla. 1st DCA 2004).

Citing *Manasota-BB, Inc. v. Gardinier, Inc.*, 481 So.2d 948 (Fla. 1st DCA 1986) and *Novick v. Department of Health, Board of Medicine*, 816 So.2d 1237 (Fla. 5th DCA 2002), Ameriloss argues that the Department's Declaratory Statement has determined the conduct of another person in violation of Rule 28-105.001, *Florida Administrative Code*.

The Court in *Manasota-BB* (or M-88) reviewed two petitions for declaratory statements by a party during a pending Section 120.57 proceeding. Both petitions were denied because they sought a declaration as to the effect of the statutes on third parties, contrary to Section 120.565, Florida Statutes. The Court stated in its opinion:

> The petitions for declaratory statement were correctly denied. Section 120.565 provides for an agency's opinion "as to the applicability of a specified statutory provision … *as it applies* to *the petitioner* in his particular set of circumstances only." Lyons and M-88 sought DER's opinion as to the applicability of statutory provisions to Gardinier, contrary to unambiguous statutory language. We affirm on this issue. (Emphasis in original.)

In the case at issue, the petition sought an agency statement addressing "petitioner's particular set of circumstances." § 120.565(1), *Fla. Stat.* (2008). Mr.

Lightbourn was not seeking a declaration of the rule's effect on third parties. Therefore, the holding in *Manasota-BB* doesn't apply here.

In *Novick,* the Court reviewed and affirmed an agency's refusal to issue a declaratory statement because "this case involves primarily a contract dispute between the parties. We affirm." *Novick* at. 816 So.2d 1238.

In like manner, this Department refused to address the contract dispute between Ameriloss and Lightbourn stating at two different paragraphs *in* its opinion:

> 13.' With regard to the first question presented by the Petitioner, whether the fee agreement was legally binding and enforceable, that *is* fundamentally a matter of contract law which must be determined by a court of law. The Department lacks jurisdiction to render an opinion on that particular issue.
>
> * * *
>
> 16. With regard to the fourth question presented, (whether, if assuming a violation of rule, the contract *is* void as it *is* violative of public policy considerations as expressed *in* the rule), for the reasons stated above, the Department *is* limited to pursuing the statutory remedies provided *in* Rule Section 69B-220.201 (2), Florida Administrative Code. (R-7-8)

Precisely like the Court's handling of the issue *in Novick,* the Department *did* not opine with regard to the contract dispute. Instead, the Department interpreted the applicable statute and rule and applied that interpretation to Lightbourne's factual situation.

DEPARTMENT'S ANSWER TO POINT TWO

I. STANDARD OF REVIEW

Agency declaratory statements are considered final agency action, § 120.565 (3), *Fla. Stat.* (2008), subject to judicial review. § *120.68(1), Fla. Stat. (2008).* An appellate court "may reverse a declaratory statement only if the agency's interpretation of law is clearly erroneous." *Adventist Health System/Sunbelt, Inc. v. Agency for Health Care Administration,* 955 So.2d 1173, 1176 (Fla. 1st DCA 2007); cf. § 120.68(7)(d), Fla. Stat. (2008). This standard affords agencies broad discretion in interpreting their governing statutes. Accordingly, "[a]gency determinations with regard to a statute's interpretation and applicability will normally be accorded great deference, unless there is clear error or conflict with the intent of a statute." *Sans Souci v. Division of Florida Land Sales and Condominiums, Dept. of Business Regulation,* 421 So.2d 623, 626 (Fla. 1st DCA 1982).

II. THE DECLARATORY STATEMENT DOES NOT CONTRADICT ANY PRIOR DEPARTMENT DECISION OR RULE ADDRESSING AN IDENTICAL QUESTION.

Ameriloss is asking the Court to quash the Agency's declaratory statement because it arguably conflicts with a statement in a Department lawyer's letter written in response to an Ameriloss inquiry in early 2006, some six months before the rule language at issue was amended. Whatever one lawyer's

opinion may be worth before the adoption of an agency's rule amendment, there is no legal precedent to suggest that an agency employee's opinion trumps both a later rule enactment and the issuing of a subsequent formal declaratory statement by the agency. On the contrary, even if an agency's personnel unintentionally misinform regulated parties as to a rule provision, the parties have no right to rely upon such representations. *Cf. Associated Industries Ins. Co. Inc. v. State Dept; of Labor & Employment* Sec., 923 So.2d 1252, 1255 (Fla. 1st DCA 2006). As was stated in *Regal Kitchens, Inc. v. Fla. Dept. of Revenue,* 641 So.2d 158 (Fla. 1st DCA 199):

> Regal's claim that the declaratory statement is invalid because it is in conflict with previous technical assistance advisements cannot be sustained in view of the plain wording of this statute. If a technical advisement is not a policy of general applicability, the Department cannot be said to have violated its policy simply by taking a new position in a declaratory statement. If that were the caSe, the Department could never recover from a mistake or revise an interpretation in a previous technical assistance advisement.

In this instance, Appellant's position would result in agency policy statements shifting every time a Department employee set pen to paper. It would have the effect of essentially nullifying a large portion of the Administrative Procedure Act addressing agency rule making and the issuance of declaratory statements (§§ 120.54-.565, *Fla. Stat.).* Were Appellant's position adopted, the untoward result would be that

every time an agency rule or declaratory statement was issued, it would be subject to challenge based on some employee's earlier statement expressed in a letter or memorandum.

To support its position, Ameriloss stretches to cite a federal circuit court decision *(CBS, infra)* addressing "the now repealed 'fairness doctrine' of the Federal Communications Commission", acknowledging "upon extensive research" the absence of any applicable Florida authorities. (IB-17)

Further, *CBS, .Inc. v. FCC,* 454 F.2d 1018 (D.C. Cir. 1971) fails to support the Ameriloss position. In *CBS,* the Court faulted the Federal Communications Commission (FCC) for failing to resolve the opposite results reached in rendering two agency **decisions** on similar facts. As the Court stated at 1027:

> Faced with **two facially conflicting decisions,** the Commission was duty bound to justify their coexistence. The Commission's utter failure to come to grips with this problem constitutes an inexcusable departure from the essential requirement of reasoned decision making ----
>
> The Commission's handling of this case does not mark its finest hour. Put to the test under pressure it waffled. Unable to articulate reasons for overruling or distinguishing *Hayes,* **the Commission effectively ignored its own obvious precedent.** Under the circumstances, its arbitrary action may not stand. (Emphasis added.)

There is no comparison between the FCC's inconsistent formal rulings and any inconsistency existing between a sentence in a Department letter and a subsequent six-page declaratory

statement. More compelling authority is found in *Friends of the Earth v. Hintz,* 800 F.2d 822, 831, fn. 8 (9th Cir. 1986):

> Appellants argue that "heightened" review is appropriate here because "the record makes clear that the Corps [of Engineers) … changed its mind on all of these points and decided to issue a § 404 permit." Appellants' Brief, page 27. But all four cases relied upon by Appellants permitted heightened review **only when an administrative agency specifically reversed a formal prior decision or regulation.** *See Baltimore & Annapolis R.R. Co. v. Washington Metropolitan Area Transit Commission,* 206 U.S. App. D.C. 397, 642 F.2d 1365, 1370 (D.C. Cir. 1980) (agency must justify departure from a twelve year old order regarding jurisdiction): *Montana Power Co. v. EPA,* 608 F.2d 334, 348 n. 27 (9th Cir. 1979) (EPA's deviation from prior decision not subject to heightened scrutiny because not deviation from "long established practice"); *ASG Industries, Inc. v. United States,* 548 F.2d 147, 154 (6th Cir. 1977) (higher showing required when agency adopts findings of fact of administrative law judge but reverses conclusions of law); *Columbia Broadcasting System, Inc. v. FCC,* 147 U.S. App. D.C. 175, 454 F.2d 1018, 1026 (D.C. Cir. 1971) (agency must explain modification of established precedent). **That is not the case here - the "decisions" reversed by the Corps were not long-standing policy or even formal decisions - but initial conclusions at the outset of a long administrative investigation.** (Emphasis added.)

Mr. Terry Butler merely expressed an opinion that was accurate when written, prior to the (5) (b) and (d) amendments to the rule. It was never law. It never amounted to an agency rule or a declaratory statement. Had the Ameriloss adjuster read *Florida Administrative Code* Rule 69B-220.201(5) (b) and (d) which limited his fee, and which was in existence at the time he contracted with Mr. Lightbourn, he would have known that his

proposed fee on the supplemental recovery was more than three times that allowed by the rule. Statutes and rules governing public adjusters are matters of general law which they are presumed to know. *See State ex rel. First Presbyterian Church of Miami v. Fuller,* 182 So. 888 (Fla. 1938) at 890: The "licensees were presumed to know the provisions and regulations controlling the sale of liquor." Also, *Ammons v. Okeechobee County, 710 So.2d* 641 *(4th DCA* 1998) at 644: "The appellants were on constructive notice of the contents of the ordinance and are presumed to have constructive knowledge of the.nature and extent of the powers of governmental agents who issue permits."

DEPARTMENT'S ANSWER TO POINT THREE

I. STANDARD OF REVIEW

The Florida Supreme Court has recognized three types of constitutional challenges as follows:

> Three types of constitutional challenges may be raised in the context of the administrative decision-making process of an executive agency. An affected party may seek to challenge: (1) the facial constitutionality of a statute authorizing an agency action; (2) the facial constitutionality of an agency rule adopted to implement a constitutional provision or a statute, or (3) the unconstitutionality of the agency's action in implementing a constitutional statute or rule.

Key Haven v. Bd. of Trustees of Internal Imp. Trust Fund, 427 So.2d 153, 157 (Fla. 1982). Ameriloss' challenge falls into the

final category, faulting the Department's action in implementing an otherwise constitutional statute or rule. This Court provides a proper forum, "sitting in their review capacity", to resolve this type of constitutional challenge. *Key Haven, supra,* at 158.

In its brief (IB-20) Ameriloss, by requesting a de *novo* review of the Department's action, is apparently attempting to strip away any presumption that the Department's interpretation of its rule be accorded "great deference". *Sans Souci, supra,* at 421 So.2d 626. Bearing in mind that neither the constitutionality of a statute nor rule is at issue, this Court should, on this review, acknowledge that "an appellate court may reverse a declaratory statement only if the agency's interpretation of the law is clearly erroneous." *Regal Kitchens, supra* at 162. Granted, this Court has "the power to declare the agency action improper and to require any modifications in the administrative decision-making process necessary to render the final agency order constitutional." *Key Haven, supra* at 158. It should not however, as Ameriloss suggests, ignore the presumption of correctness that attaches to the Department's Declaratory Statement.

II. THE DECLARATORY STATEMENT DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS.

Ameriloss argues that the Declaratory Statement is in violation of the Fourteenth Amendment, *United States Constitution* and Article I, Section 2 of the *Florida Constitution* because it has the effect of treating Ameriloss "differently than other public adjusters." (1B-20)

Ameriloss' argument appears to be that since some public adjusters may have entered into contracts before the effective date (September 3, 2006) of the subject amendment to Rule 69B-*220.201, Florida Administrative Code,* they didn't suffer the ten percent fee limitation that applies to Ameriloss' contract with Lightbourn that occurred after September 3, 2006. That may be true, but that doesn't mean that Ameriloss has suffered an equal protection of the law deprivation. All public adjusters are treated the same by the rule change. The new rule applies equally to all adjusters who contract subsequent to September 3, 2006.

Ameriloss further states that "the law would simply not permit a revisiting of the latter contractual arrangements [those that occurred before September 3, 2006] based on a claim of retroactive application of Rule 69B-220.201." Again, that may be true, but there is no evidence to suggest that the Department either has applied, or intends to apply; the rule retroactively. The rule only applies to those contracts executed **after** its adoption, as was the case in this instance.

Ameriloss cites *Amos v. Dept. of Health and Rehab. Services,* 444 So.2d 43 (Fla. 1st DCA 1984) and N. *Miami Gen. Hosp., Inc. v. Office of Community Med. Facilities, Dept. of HRS,* 355 So.2d 1272 (Fla. 1st DCA 1978) *(North Miami Hospital)* in support of its argument that it being treated differently from other adjusters similarly situated.

In Amos, the agency applied an agency statement of general applicability prescribing policy without adopting it as a rule. The unadapted rule was then applied so as to deny benefits to an applicant for Aid to Families with Dependent Children (AFDC). The Court stated, "We reverse the agency's action, since it was based upon 'CSE Policy Clearance 79-6,' a rule which has not been promulgated pursuant to the Florida Administrative Procedure Act." *rd.* at 44. In the instant case, Ameriloss cannot argue non-rule policy because there is a rule in place addressing the issues raised by Ameriloss. Rather, Ameriloss is challenging the Department's **interpretation** of its Rule 69B-220.201, Florida Administrative Code. Thus, the facts in *Amos* make it irrelevant to this case.

The decision in *North Miami Hospital* reversed an HRS final order finding that the hospital had not established a need to purchase a computerized axial tomography (CAT) scanner. The Court faulted the agency for applying unpublished criteria in arriving at its conclusion that existing CAT scanners were being

underutilized, (that a minimum of 2400 procedures per year per scanner is a reasonable requirement to be met before additional scanners should be approved), and found that HRS had not established "sufficient competent substantial evidence to support [the HRS final] order." *Id.* at 1276. The Court stated in relevant part:

> Finally, the respondent's order must be reversed because the record reflects that during the period of time under which it had petitioner's application under consideration, the Department, as a result of a hearing officer's recommendation, granted an application to another Dade County hospital and in so doing found that the 2400 scan per year per machine formula or standard was not a reasonable basis for determining community need in Dade County. In that proceeding, **the hearing officer found that the** Department had not **adopted any criteria for determining community need for scanners.**
>
> * * *
>
> We hold that such inconsistent results based upon similar facts, **without a reasonable explanation,** violate not only express provisions of the Administrative Procedure Act (Chapter 120, F.S.), but are violative of the equal protection guarantees of both the Florida and United States Constitutions. (Emphasis added.)

Here the Department is merely, by declaratory statement, interpreting its rule in a manner which happens to conflict with an agency attorney's opinion that preceded adoption of the amended rule language at issue. *North Miami Hospital* is irrelevant to this case because there is nothing in the record to suggest that the Department's Declaratory Statement is

inconsistent with any statute, rule, final order, or prior declaratory statement.

DEPARTMENT'S ANSWER TO POINT FOUR

I. STANDARD OF REVIEW

Ameriloss' argument that it has suffered an unconstitutional impairment of its vested rights to contract should be reviewed applying the same standard as set forth under Point Three above.

II. THE DECLARATORY STATEMENT DOES NOT IMPAIR VESTED CONTRACT RIGHTS UNDER THE FLORIDA CONSTITUION.

In its Initial Brief at 22-24, Ameriloss argues:

> Admittedly, the Declaratory Statement analyzes the issue of retroactivity and finds "the declaration of the state of emergency occurred prior to the execution of the fee agreement at issue, it cannot be said that Ameriloss actually suffered an impairment of rights that they possessed when they "*acted*" (entered into the fee agreement).[" citation omitted.] While this is certainly not challenged as a correct [incorrect?] statement of "the law," under the correct circumstances, Appellant does challenge this conclusion as to a correct statement of the law as it [is] applied to his [sic] set of facts.
>
> Indeed, Appellant did have a vested right to contract for the 33 1/3% cap at the point where the Emergency Rule related to Hurricane Katrina expired - November 26, 2005 and for all time thereafter.
>
> * * *
>
> To permit the Declaratory Statement to stand premised upon the idea that a "state of emergency" which has been effectively nullified by the actual language of the Rule deolaring the emergency (Rule 69BER05-10(1) (d) would essentially give recognition to "an emergency" and the attending rules thereto that was no longer in existence - an outcome that simply cannot be afforded. (IB-23-24)

Ameriloss' argument appears to be that the Department, having enacted an emergency rule placing a cap on adjuster's fees applied to losses suffered during the emergency period, is constitutionally prohibited from thereafter enacting a permanent rule capping a fee on an adjuster's services, and applying the cap to a loss suffered during the emergency period. The three cases cited by Ameriloss do not support this position.

In *Island Manor Apartments of Marco Island, Inc. v. Div. of Fla. Land Sales, Condos and Mobile Homes* (the Division), 515 So.2d 1327 (Fla. 2nd DCA 1987), the Court reviewed the Division's declaratory statement retroactively applying a 1977 statutory enactment to a condominium declaration adopted pursuant to a 1971 statute. That declaration provided for the assessment of common expenses pursuant to a certain formula. The later statute required that unit owners' assessments be made "in the same proportions as their ownership interest in the common elements." § 718.115(2), *Fla. Stat.* (1985). The Court held that the later statute could not be applied so as to strike down the preexisting condominium declaration for two reasons. First, the legislature made no provision for such. Secondly, even if it had done so, it would have unconstitutionally impaired **vested** contract rights. *Id.* at 1329. Unlike *Island Manor*, the agreement at issue here was executed **after** the law had changed. Thus, Ameriloss had no vested contract rights that were thwarted

by the amended rule language. The *Island Manor* holding implies that contracts like the one executed in this instance, is necessarily subject to the law extant at the time of execution. *Island Manor* therefore supports the. Department's Declaratory Statement.

In *Tradewinds of Pompano Ass., Inc. v. Rosenthal,* 407 So.2d 976 (Fla. 4th DCA 1982) the Court noted that the Florida Supreme Court had declared Section 718.401(4), Florida Statutes (1979) unconstitutional "as an impermissible impairment of the obligation of contract, at least with respect to contracts in existence on the effective date of the legislation. *Pomponio v. Claridge of Pompano Condominium,* 378 So.2d 774 (Fla. **1980)."** *Tradewinds* at 977). The issue before the *Tradewinds* Court was whether the filing of the master lease attached to the condominium declaration established the rights and obligations of the lessors, even though individual condominium buyers recorded "short form" leases after the applicable statutory language took effect. The Court stated at 977:

> We hold that the recording of the declaration of condominium and the master lease established the rights and obligations of the lessor. Presumably, some sales were made and recorded prior to October 1, 1974, because the notice of rent deposits was limited to that class of owners who had executed short form leases after October 1. Nevertheless, the fact that some of the unit owners became parties to the lease after October 1 does not alter the existence of the lease and the lessors' obligations before that date. Consequently, **because the lease existed prior to the**

> **effective date** of Section 718.401(4), *Pomponio* dictates a finding that under these facts the application of the statute is unconstitutional as impairing the contract rights of the lessors. (Emphasis added.)

Once again, the agreement **preceded** the effective date of the new law, unlike the contract executed by Ameriloss and Lightbourn.

In *Yamaha Parts Distributors Inc.* ***v.*** *Ehrman,* 316 So.2d 557 (Fla. 1975), a motorcycle company had a franchise agreement with a sales distributor. Two Florida statutes went into effect after the agreement, one requiring a motor vehicle manufacturer to give 90 days notice to a franchisee prior to the cancellation of a franchise contract, the other authorizing injunctive relief for a failure to comply with the notice provision. The court held that these statutory provisions applied prospectively and neither had any application to the subject agreement.

Applying the same rationale here, the change to *Florida Administrative Code* Rule 69B-220.201 (effective September 3, 2006) operated prospectively and therefore applied to the contract between Ameriloss and Lightbourn signed January 4, 2007. Ameriloss' retroactive application argument was fully addressed by the Department in the Declaratory Statement as follows:

> 11. Generally speaking, an administrative rule cannot be applied retroactively unless there is express statutory language authorizing such

> retroactivity, or the rule language at issue merely clarifies an existing rule. *Gulfstream Park v. Division of Par-Mutuel [sic] Wagering, Dept. of Business Regulation,* 407 So.2d 263 (Fla. 3d DCA *1981); See also Environmental Trust,* et *al. v. Depte. Of Environmental Protection,* 714 So.2d 493, 499 (Fla. 1st DCA 1998); *Bowen v. Georgetown University Hospital,* 488 U.S. 204, 109 S.Ct. 468, 102 L.Ed.2d 493 (1998). However, it is important to note that a statute or rule is not deemed to be retroactive merely because it is applied in "a case arising from *conduct antedating the statute's enactment;"* rather, the operative inquiry is "whether the new provision attaches new legal consequences to events *completed* before its enactment." (Emphasis added.) *Langdraf,* 511 U.S. at 269-270. The Supreme Court observed that "familiar considerations of fair notice, reasonable reliance, and settled expectations" should offer guidance in those hard cases where a finding of retroactivity requires balancing "the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Id.* at 270. In the instant case, although the declaration of the state of emergency occurred prior to the execution of the fee agreement at issue, it cannot be said that AmeriLoss actually suffered an impairment of rights that they possessed when the "*acted*" (entered into the fee agreement). *Id.* at 280. Instead, it is clear that AmeriLoss had *prior notice* that only a ten percent fee for such services rendered in connection with hurricane damage was deemed to be appropriate, because the rule at issue was already in effect at the time the parties entered into the fee agreement.

In summary, the Department did not retroactively apply a rule to Appellant's circumstances. It enacted a rule and the Ameriloss agent subsequently signed a contract subject to the rule.

DEPARTMENT'S ANSWER TO POINT FIVE

I. STANDARD OF REVIEW

Appellate courts afford great weight to an agency's construction of a rule that the agency is charged with enforcing and interpreting and a court's departure from the agency construction is only appropriate if the agency construction is clearly erroneous. *Collier Cty. Bd. of Cty* Com'rs *v. Fish and Wildlife Conservation Com'n,* 993 So.2d 69 (Fla. 2nd DCA 2008). This Court has stated that an agency's interpretation of the guidelines that it is charged with administering is entitled to judicial deference and should not be overturned as long as the interpretation is in the range of permissible interpretations. *Atlantic Shores Resort, LLC v. 507 South Street Corp.,* 937 So.2d 1239 (Fla. 3rd DCA 2006).

II. THE DECLARATORY STATEMENT DOES NOT INCORRECTLY APPLY RULE 69B-220.201, F.A.C., OR IMPAIR A LEGITIMATE CONTINGENT FEE ARRANGEMENT.

Unable to cite a single decision holding that this agency is without authority to regulate the fee an adjuster is allowed to charge an insurance consumer, Ameriloss cites authorities upholding contingency fee arrangements between lawyers and their clients. (IB-25-26) Public adjusters, of course, are not lawyers and have no authority to prosecute or defend claims. *Larson v.* Lesser, 106 So. 2d 188 (Fla. 1958). The analogy of the public

adjuster to a lawyer is inappropriate in the area of contingency fees, given that the limits of a public adjuster's authority are merely to represent an insured in the preparation and submission of a claim under an insurance contract. *Id.* Because a public adjuster's duties and powers to represent the insured pale in comparison to the duties and powers of a lawyer representing a client, the same policy considerations allowing for higher contingency fees for lawyers ,are not applicable to public adjusters. What is important to note is that both lawyers and public adjusters are limited in the percentage of contingency fees that they can charge their clients. The Department, through the rule-making process, has chosen 'to limit the percentage contingency fee a public adjuster can charge to ten percent when the insured's claims arise out of events that occurred during a declared state of Emergency. Ameriloss cannot now argue that public policy justifies this court creating a different rule, one that makes an exception for contracts entered into after the rule's enactment. Such a decision would stand the existing rule on its head, giving it an interpretation that should not be sustained.

Generally, the percentage of contingency fees public adjusters are allowed to charge is determined by the insurance commissioners of each state. This type of regulation over public adjusters "serves to protect the insured party from an

overreaching adjuster." *Exec. Servs.* v. *Karwowski,* 832 A.2d 1212 (Conn. App. 2003). The state of Connecticut has promulgated a regulation, similar to the regulation at issue in this case, stating that "no public adjuster shall receive compensation in excess of 10% of the actual or final settlement of a loss covered by the employment contract." *Regs., Conn. State Agencies* Section 38a-788-8. The state of Florida, acting through the Department, also recognized the dangers posed by overreaching adjusters--especially to those consumers made vulnerable by events that created a state of emergency--and created the ten percent cap on adjuster contingency fees that is now being challenged by Ameriloss.

The proper starting point for an analysis of the Department's authority on this issue is Section 626.878, *Fla. Stat.* (2008) quoted on page 2 above. The Florida Legislature recognized the need for a code of ethics applicable to insurance adjusters, directing the Department to "specify the terms and conditions of contracts … and require practices necessary to ensure fair dealing…" by insurance adjusters. *Id.* Accordingly, the Department promulgated *Florida Administrative Code* Rule 69B-220.201, addressing the "Ethical Requirements" of "all types and classes of insurance adjusters." *Fla. Admin. Code R.* 69B-220.201(1) (a). An amendment to this rule limits fees charged by

adjusters on claims that arise during a state of emergency declared by the Governor and further provides:

> (dl This subsection applies to all claims that arise out of the events that created the State of Emergency, whether or not the adjusting contract was entered into while the State of Emergency was in effect and whether or not a claim is settled while the State of Emergency is in effect.

Fla. Admin. Code R. 69B-220.201 (1) (dl.

Ameri10ss does not consider this rule provision to be fair. However, it did not challenge the rule amendment, either as proposed or as adopted, as allowed by Section 120.56, *Florida Statutes*. "An administrative agency cannot effectively repudiate one of its own rules by making a contrary expression in a declaratory statement." *Regal Kitchens, supra* at 162. Ameri10ss is improperly seeking to have this Court repudiate a Department rule by means of this challenge to a declaratory statement.

The only proper issue facing this Court is whether this Department has reasonably interpreted that rule in its Declaratory Statement, applying the standard of review as outlined above. On the facts of this case, the Department's interpretation and application of its rule is reasonable. There is no dispute as to when the rule was adopted. There is no dispute that the contract was signed after the rule took effect. The determinative rule language provides: "This subsection

applies to all claims that arise out of the events that created the State of Emergency, whether or not the adjusting contract was entered into while the State of Emergency was in effect…." *Fla. Admin. Code R.* 69B-220.201(5) (d).

To quote from the Declaratory Statement at issue:

> 9. Based on the specific facts presented in the Petition, Rule 69B-220.20l(5) (b), Florida Administrative Code is indeed applicable to the issues presented. The above-referenced rule that is at issue in this petition became effective on **September 3, 2006.** As previously stated, the parties entered into the fee agreement at issue on **January 4, 2007,** approximately four months *after* the rule was promulgated. Thus, under the facts presented, although the Governor of the State of Florida issued an Executive Order declaring a state of emergency as a result of the anticipated landfall of Hurricane Katrina prior to the execution of the fee agreement, the operative rule was in effect well before that date. (R-5; emphasis in the original.)

Section 626.878, *Florida Statutes* (2008), quoted on page 2 above, mandates that the Department promulgate rules specifying the terms and conditions of insurance adjuster contracts.. It specifically requires that such rules address "practices necessary to ensure fair dealing." Pursuant to that legislative grant of authority, the Department adopted Rule 69B-220.20l, *Florida Administrative Code.* That rule imposes limitations on fees charged by adjusters for claims that arise out of events that created the state of emergency as declared by the Governor, regardless of whether the contract was in effect during the state of emergency. The rule has not been challenged. The

Declaratory Statement under review interprets and applies that rule. The Department's interpretation is a completely reasonable one given the "particular set of circumstances" (§ *120.565(1), Fla. Stat.)* contained in the petition.

CONCLUSION

For the foregoing reasons, the Court should affirm the Department's Declaratory Statement.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was sent by U.S. Mail to: Barbara J. Scheffer, 11380 Prosperity Frams Road, Suite 204, Palm Beach Gardens, FL 33401 and Thomas R. Blake, 1205 Mariposa Avenue, Suite 412, Coral Gables, FL 33146 this 6 day of August, 2009.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a).

David J. Busch
Florida Dept. of Financial Services
200 E. Gaines Street, Room 612
Tallahassee, FL 32399-0333
(850) 413-4146

Florida Bar No. 140945